

## 50 YEARS OF LOVING: A REFLECTION ON SEEKING JUSTICE THROUGH LOVE AND RELATIONSHIPS

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If an openly gay man or woman was asked twenty-five years ago (1992) if the country would sanction same-sex marriage, the response would likely have been one of utter incredulity. At that time, the AIDS crisis was in its second decade and those infected with the HIV virus were still facing a high probability of death.<sup>1</sup> The first combination drug therapies, often referred to as “cocktails,” that significantly improved the life expectancy for those infected with the HIV virus, were not introduced until 1996.<sup>2</sup> The Lesbian, Gay, Bisexual, and Transgender (“LGBT”)<sup>3</sup> community was almost singularly focused on combatting the AIDS epidemic, which included fighting for increased funding and research as well as caring for the affected members in their communities. I “came out” around that time, eventually meeting my life partner in 1998. Like most gay men at the time, we were not “out” at work nor with our primary physicians, utilizing anonymous HIV testing at the city health clinic. Being open about your same-sex orientation in a Midwestern city was a freedom few of us exercised, or if we did, we did so with extreme caution. Accordingly, this part of my identity was placed in a box kept separate from professional and certain personal segments of my life. Although my life partner and I participated in a non-legally-binding commitment ceremony in 2000, we had no expectation that our commitment would be legally recognized until we were old and gray at best. I came from a strong Sicilian, Roman Catholic heritage where marriage was sacrosanct, so I was satisfied in not reconciling my committed relationship with that sa-

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1. *Thirty Years of HIV/AIDS: Snapshots of an Epidemic*, AMFAR, <http://www.amfar.org/thirty-years-of-hiv/aids-snapshots-of-an-epidemic/> (last visited Mar. 23, 2017).

2. *Id.*

3. Although the term “LGBT” (Lesbian, Gay, Bisexual, Transgender) is used generally throughout this reflection to refer to the movement for equality for those who identify as other than heterosexual, the focus of this reflection is on same-sex marriage rights and thus is primarily addressing sexual orientation (i.e., lesbian, gay, and bisexual).

cred view of marriage. Instead, my partner and I were gratified to have the acceptance of our families and friends and to continue to work on education and awareness of LGBT issues through local and national organizations. Without the statutory protections afforded legally-recognized marriages, we necessarily utilized trusts and other estate planning documents to ensure our wishes of providing for each other at death were honored.

The significance of the fiftieth anniversary of the United States Supreme Court's decision in *Loving v. Virginia*<sup>4</sup> can be neither underestimated nor underappreciated by the members of the lesbian and gay community presently in, or aspiring to be in, legally-recognized marriages. The thematic overlaps between *Loving* and the Supreme Court's more recent decision in *Obergefell v. Hodges*<sup>5</sup> are inescapable.<sup>6</sup> Both cases involve the marital rights of two individuals who society viewed as non-traditional and, thus, inappropriate marital partners. In both cases, the court system and a segment of society, in varying degrees, evolved to accept the marital rights of interracial and same-sex couples, contrary to another segment of society that did not condone and protested the conferral of such rights. Mildred Loving, one of the plaintiffs in *Loving*, clearly saw the connection between her and her husband's fight for racial equality in marriage and the struggle for same-sex marriage recognition. She endorsed equal marriage for all couples, regardless of their race, sex, or sexual orientation in a statement entitled "Loving for All," issued for the fortieth anniversary of the landmark decision:<sup>7</sup>

My generation was bitterly divided over something that should have been so clear and right. The majority believed that what the judge said, that it was God's plan to keep peo-

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4. 388 U.S. 1 (1967).

5. 135 S. Ct. 2584 (2015).

6. See David Boaz, *Interracial Marriage as a Precedent for a Gay Marriage Decision*, NEWSWEEK (June 16, 2015, 12:26 PM), <http://www.newsweek.com/interracial-marriage-precedent-gay-marriage-decision-343487>.

7. Public Statement, Mildred Loving, *Loving for All* (June 12, 2007), [http://archive-freedomtomarry.org/pdfs/mildred\\_loving-statement.pdf](http://archive-freedomtomarry.org/pdfs/mildred_loving-statement.pdf). It is important to note that although there are definite thematic overlaps between *Loving* and the same-sex marriage cases, the petitioners in *Loving* were charged with a felony and suffered the criminal sanction of confinement for marrying in Washington, D.C. and returning to live in Virginia. See *Loving v. Virginia*, 388 U.S. 1, 3-4 (1967). In contrast, individuals that were married in a state that sanctioned same-sex marriage (e.g., Massachusetts) and returned to a state that did not recognize that marriage prior to *Obergefell* (e.g., Nebraska) were not charged with a felony and subject to criminal penalties. This was due in part to the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), *rev'g* *Bowers v. Hardwick*, 478 U.S. 186 (1986). *Lawrence* struck down Texas's "homosexual conduct" law, which criminalized sexual intimacy by same-sex couples, and by implication, struck down similar sodomy laws still on the books in twelve other states. *Lawrence*, 539 U.S. at 573.

ple apart, and that government should discriminate against people in love. But I have lived long enough now to see big changes. The older generation's fears and prejudices have given way, and today's young people realize that if someone loves someone they have a right to marry.

Surrounded as I am now by wonderful children and grandchildren, not a day goes by that I do not think of Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the "wrong kind of person" for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. Government has no business imposing some people's religious beliefs over others. Especially if it denies people's civil rights.

I am still not a political person, but I am proud that Richard's and my name is on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young or old, gay or straight seek in life. I support the freedom to marry for all. That's what *Loving*, and loving, are all about.<sup>8</sup>

Notwithstanding Mildred Loving's poignant statement, the comparison of the two landmark decisions in *Loving* and *Obergefell* also yields some stark differences in the comparative struggles for racial and sexual orientation equality. One of the greatest differences is the American public's opposition to, or approval of, granting marital rights. When *Loving* was decided in 1967, approximately seventy-two percent of Americans remained opposed to interracial marriage, with sixteen states still sustaining anti-miscegenation laws.<sup>9</sup> The Supreme Court struck down those laws, effectively superseding public opinion at the time. In contrast, at the time of *Obergefell*, approximately fifty-eight percent of Americans supported marriage rights for same-sex couples; such support essentially doubling from 1996 when only twenty-seven percent approved.<sup>10</sup> In addition, thirty-seven states already conferred marital rights to same-sex couples at the time of the Supreme Court's decision.<sup>11</sup> So, from a public opinion viewpoint, the Supreme Court was on more solid footing when it ordered the remain-

8. Public Statement from Mildred Loving, *supra* note 7.

9. Peter Dreier, 'Loving' Reminds Us of an Earlier Struggle for Marriage Equality, THE AM. PROSPECT (Nov. 11, 2016), <http://prospect.org/article/%E2%80%98loving%E2%80%99-reminds-us-earlier-struggle-marriage-equality>. See also *Loving*, 388 U.S. at 6.

10. Justin McCarthy, U.S. Support for Gay Marriage Steady After High Court Ruling, GALLUP (July 17, 2015), <http://www.gallup.com/poll/184217/support-gay-marriage-stable-high-court-ruling.aspx>.

11. Julia Zorthian, *These are the States Where SCOTUS Just Legalized Same-Sex Marriage*, TIME (June 26, 2015), <http://time.com/3937662/gay-marriage-supreme-court-states-legal/>.

ing thirteen states to confer marriage rights to same-sex couples than when it outlawed the remaining states' bans on interracial marriage. Nevertheless, Justice Anthony Kennedy, who wrote the majority opinion in *Obergefell*, acknowledged numerous times the "urgency" and "continuing harm" to the petitioners, thus imposing a duty on the Court to address the marital rights issue.<sup>12</sup> His explanation applied as much to the petitioners in *Loving* as it did to those aggrieved in *Obergefell*:

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."<sup>13</sup>

Another primary difference between the two marriage rulings was the timing of the ruling in the overall history of the respective equality movement. As one commentator explained: "Whereas *Loving* marked the endpoint of an era of the institutionalization of formal racial equality norms in constitutional Equal Protection doctrine and in federal statutory law, *Obergefell* stands much closer to the beginning of such a process."<sup>14</sup> At the time of the *Loving* decision, federal laws protecting against racial discrimination, thereby establishing formal racial equality, had been enacted.<sup>15</sup> Eradicating the remaining bans on interracial marriage was the culmination of a racial equality movement that reached its zenith in the 1960s. In contrast, although the LGBT community has been extremely successful in shifting public sentiment in a relatively short period of time, federal statutory and case law to date lacks any "explicit guarantees of formal equality,"<sup>16</sup> thus permitting gays and lesbians to marry but still be fired in the

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12. Maureen Johnson, *You Had Me At Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly-Contested U.S. Supreme Court Decisions*, 49 IND. L. REV. 397, 430 (2016).

13. *Obergefell*, 135 S. Ct. at 2605-06 (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943)).

14. Katie Eyer, *Brown Not Loving: Obergefell and the Unfinished Business of Formal Equality*, 125 YALE L. J.F. 1 (2015).

15. *Id.* at 4-5. See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445; Civil Rights Act of 1964, Pub. L. No. 88-353, 78 Stat. 241; *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954).

16. See Eyer, *supra* note 14, at 2.

workplace based on their sexual orientation.<sup>17</sup> Furthermore, state-wide employment laws that protect individuals from discrimination based on their sexual orientation are still lacking in a majority of states,<sup>18</sup> although protection in varying degrees is afforded by local ordinances.<sup>19</sup> Accordingly, from a federal law perspective, it raises the question of whether the Supreme Court merely missed or intentionally declined an opportunity in *Obergefell* to go beyond marital rights and more broadly ban discrimination based on sexual orientation.<sup>20</sup>

Notwithstanding the differences discussed above, the *Loving* and *Obergefell* decisions share one significant result—their impact of legitimizing families by granting marital rights to interracial and same-sex couples. To provide a brief background, the *Obergefell* decision was issued two years after the other two contemporary cases involving gay marriage rights were delivered by the Supreme Court on the same day: *Hollingsworth v. Perry*<sup>21</sup> and *United States v. Windsor*.<sup>22</sup> *Hollingsworth* addressed and ultimately overturned California’s Proposition Eight, which amended the state constitution to include a ban on same-sex marriages.<sup>23</sup> *Windsor* primarily addressed the constitutionality of the Defense of Marriage Act (“DOMA”), which defined “marriage” and “spouse” for federal law purposes.<sup>24</sup> The Supreme Court determined in *Windsor* that DOMA violated Fifth Amendment due process and equal protection restraints on actions of the Federal Government.<sup>25</sup> What began in *Windsor* and *Hollingsworth* and continued in *Obergefell* was a focus on the family unit—same-sex parents and their children—and the notion of their entitlement to dignity and

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17. Keith Cunningham-Parmeter, *Marriage Equality, Workplace Inequality: The Next Gay Rights Battle*, 67 FLA. L. REV. 1099, 1100-01 (2015) (stating Title VII employment protections do not apply to persons “based on their sexual preferences” (citing *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000))).

18. Anthony C. Infanti, *Victims of Our Own Success: The Perils of Obergefell and Windsor*, 76 OHIO ST. L.J. FURTHERMORE 79 (2015). See *Maps of State Laws & Policies*, HUM. RTS. CAMPAIGN, [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps).

19. See *Equality Maps*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_ordinances](http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances) (last visited Apr. 3, 2017).

20. Amar Khoday, *The United States Supreme Court and Same-Sex Marriages: Did The Court Miss An Opportunity for Something Greater?*, POL. ANIMAL, <http://politicalanimalmagazine.com/a-missed-opportunity/> (last visited Apr. 3, 2017).

21. 133 S. Ct. 2652 (2013).

22. 133 S. Ct. 2675 (2013).

23. Johnson, *supra* note 12, at 416-17.

24. *Id.* at 417; Defense of Marriage Act, Pub. L. No. 104-19, 110 Stat. 2419 (enacted Sept. 21, 1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C). Section three of DOMA defined “marriage” as “only a legal union between one woman and one man as husband and wife,” and “spouse” as “only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C. § 7 (2012).

25. Nicholas A. Mirkay, *Equality or Dysfunction? State Tax Law in a Post-Windsor World*, 47 CREIGHTON L. REV. 261, 264 (2014).

equal treatment under the law.<sup>26</sup> The Supreme Court opined in *Windsor* that DOMA equated same-sex marriages to “second-class marriages” and such differing treatment not only “demeans the couple” but also “humiliates tens of thousands of children now being raised by same-sex couples.”<sup>27</sup> As noted by one commentator, Justice Anthony Kennedy, who wrote for the majority in *Windsor*, addressed “children” nine times, despite the fact that the lesbian plaintiffs did not have any children.<sup>28</sup>

In *Obergefell*, the Supreme Court explicitly stated that protecting children and families of same-sex couples was a key rationale in its determination that the right to marry is fundamental under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>29</sup> The Court explained that granting marital rights to same-sex couples permits their children “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”<sup>30</sup> The Court acknowledged the “loving and nurturing homes” provided to children of same-sex couples and that “[w]ithout the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.”<sup>31</sup>

At the time of the *Obergefell* decision, my life partner and I had been together for almost seventeen years. We considered ourselves spiritually, even if not legally, married because of our 2000 commitment ceremony, and our family and friends considered us married as well. Accordingly, we did not feel a great compulsion to get married in any of the states that had legally sanctioned same-sex marriage prior to the *Obergefell* decision. As a tax attorney, I consistently communicated to my life partner that only when our marriage was legally recognized in all the states would such a decision truly make sense from a tax perspective. After *Windsor*, the complications of being married in one state with federal recognition, yet living in another state with nonrecognition, caused more dysfunction and complexities from a tax perspective than true equality.<sup>32</sup> The Supreme Court likewise acknowledged in *Obergefell* that “[b]eing married in one State but having that valid marriage denied in another is one of ‘the most perplexing and distressing complication[s]’ in the law of domestic rela-

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26. Johnson, *supra* note 12, at 418.

27. *Windsor*, 133 S. Ct. at 2693-94 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

28. Johnson, *supra* note 12, at 421 (noting that the count also includes derivatives of “children”—e.g., “child”). Justice Kennedy likewise referenced “dignity” twelve times in the opinion, which was duplicated in *Obergefell*. *Id.*

29. *Obergefell*, 135 S. Ct. at 2600.

30. *Id.* (citing *Windsor*, 133 S. Ct. at 2694-95).

31. *Obergefell*, 135 S. Ct. at 2600.

32. Mirkay, *supra* note 25, at 285.

tions,” promoting “instability and uncertainty.”<sup>33</sup> Reminiscent of *Loving*, since we were domiciled in Nebraska, a pre-*Obergefell* Delaware marriage certificate would have been “no good here.”<sup>34</sup>

But one consideration eclipsed all those federal and state legal complexities—our son. Since he was several years old, he comprehended his difference as an adopted child of same-sex parents. As the states began allowing same-sex marriage, he often would mention that “we” should go back to Delaware, where we used to live, or nearby Pennsylvania and get married. Upon receiving clarification that only his two dads could marry, he would offer the perennial kid response of “I know.” But his use of the word “we” signified to my partner and I that he saw the worth in our marriage in that it legitimized his “different” family. Even though he always viewed his immediate family positively and proudly, which was reinforced by all the extended family and friends around him, our marriage would clearly allow him to appreciate “the integrity and closeness of [his] own family and its concord with other families in [his] community and in [his] daily” life.<sup>35</sup> Once *Obergefell* was handed down by the Supreme Court we knew that the time for our marriage to be legally recognized had finally come.

Another consideration that was part of our decision to legally marry was the recognition and honoring of those before us who had fought for LGBT rights. Beginning in the late 1960s and all the way up to the *Obergefell* decision in 2015, countless men and women had valiantly fought legal and social battles for equality in society and in the workplace. At the core of this fight has been the right to love the person we choose, not who the state determines is appropriate. This theme of love and dignity is similarly present in *Loving*, where one of the A.C.L.U. attorneys involved in the case remembered Mr. Loving instructing him to “tell the court I love my wife, and it is just unfair that I can’t live with her in Virginia.”<sup>36</sup> Mr. Loving’s statement was poignantly simple and powerful. Upon hearing that statement when watching both the documentary and the film on the Lovings’ battle for lawful interracial marriage, it immediately struck a chord with me. It reminded me of a core feeling I had retained since acknowledging my sexual orientation—let me live my life truthfully and without interference.

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33. *Obergefell*, 135 S. Ct. at 2607 (citing *Williams v. North Carolina*, 317 U.S. 287, 299 (1942)).

34. Douglas Martin, *Mildred Loving, Who Battled Ban on Mixed-Race Marriage, Dies at 68*, N.Y. TIMES (May 6, 2008), <http://www.nytimes.com/2008/05/06/us/06loving.html>.

35. *Obergefell*, 135 S. Ct. at 2600 (citing *Windsor*, 133 S. Ct. at 2694-95).

36. Martin, *supra* note 34.

In determining the Constitution does not deprive same-sex couples of the liberty and personal autonomy associated with marriage—a connection on which the *Loving* decision was similarly based<sup>37</sup>—the Court concluded its *Obergefell* decision with an eloquent declaration:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.<sup>38</sup>

When my life partner and I renewed our 2000 commitment vows, and were “legally married” in October 2015, a slideshow documenting our life together ended with the first two sentences of the above declaration. In the words of Mildred Loving, I am now proud in my life and marriage to “reinforce the love, the commitment, the fairness, and the family that so many people . . . seek.”<sup>39</sup> And as the Lovings so aptly demonstrated in their legal struggle and life journey, that is what loving is all about.

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37. *Obergefell*, 135 S. Ct. at 2599.

38. *Id.* at 2608.

39. See Public Statement from Mildred Loving, *supra* note 7.